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No. 88-987

In The

Supreme Court of the United States

October Term, 1988

DAVID HESSE,

Petitioner,

v.

BOARD OF EDUCATION OF TOWNSHIP HIGH SCHOOL DISTRICT NO. 211, COOK COUNTY, ILLINOIS, ROBERT CREEK, ANNA COUNTRYMAN, ANNE KOLLER, JOSEPH MARCHIORI, JAMES ROGERS, ROBERT SEGER, RICHARD C. KOLZE AND JACK GAZA,

Respondents.

On Writ Of Certiorari To The
United States Court of Appeals
For The Seventh Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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TABLE OF AUTHORITIES

ILLINOIS STATUTES

Page

Chap. 48, Sec. 2002, *Ill. Rev. Stat.* (1985) 8

CASES:

Connick v. Myers, 461 U.S. 138 (1983) 6

Knapp v. Whitaker, 757 F2d 827 (7th Cir., 1985) 6

Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977) 6,8

Pickering v. Board of Education, 391 U.S. 563 (1968) 8

ARGUMENT

I. AN OBJECTIVE STANDARD SHOULD BE APPLIED HERE

In true Orwellian fashion, the defendants have attempted to recast the facts of the case to rewrite history. The answer brief is replete with mischaracterizations far too numerous to refute in their entirety (e.g. that a 2-1 decision in the Appellate Court is a "unanimous result" and "as matters escalated, Hesse joined polemics to the defense of his teaching practices," implying that Hesse's educational issues were an afterthought).

Defendants have artfully presented partial quotations and a skewed rendering of the evidence in an attempt to cast Hesse as an insubordinate teacher who could not tolerate criticism. This ploy is obviously designed to convince this Court that the case is merely a personnel dispute. We shall here attempt briefly to put the facts in perspective.

A. HESSE'S WRITINGS HAVE LONG CONTAINED PROTECTED SPEECH

It is important to realize that Hesse had for many years expressed his opinion on matters of grade fraud, inadequate discipline and the use of teacher evaluations to silence teachers.

Examples of Hesse's early (1977-79) memos (Pl. Gr. Ex.9) are as follows:

> There are two major developments in education today that the national Media have found to be well worthy of their attention. The first was that the press discovered that school systems, administrators, and teachers were becoming the target of lawsuits centering around the idea that a student's constitutional rights were being violated in many different respects by the various public school systems around the country.
>
> The second development that the press found of great interest was that a surprisingly large number of students were designated by their grades

to have passed courses when, in reality, later circumstances painfully disclosed the fact that these students lacked the basic skills that the passing grades were supposed to indicate they had acheived.

This regrettable situation has resulted in lawsuits that are based on the idea that the schools have defrauded the public by falsifying the evaluation of student achievement.

* * *

I will open this response by noting what I feel to be the somewhat embarassing (sic) fact that SCHOOL DISTRICT 211, and other districts as well, are being forced by public pressure to institute competency testing for all students before allowing them to graduate. This seems, to me, to be a heavily symbolic plead (sic) of nolocontendere to the media's charge that they cannot be trusted to grade students honestly, as schools used to be able to do in times past.

I will attempt, in this memorandum, to show how the problem of false grades came into existence and how, erroneous evaluation, along with their advice of financially punative (sic) action against teachers, are actually prime contributors to the problem of more and more money being spent by public schools, while students walk across stages to accept diplomas that have come to certify the very real possibility that the student just might not even be able to read it!

It is my view that the evaluation given me, the information it contains, and its recommendations, represent an attempt to intimidate a good teacher into giving false high grades and establishing low standards in his classes. The motivation for this lies in the fact that the department, the school, and the district have a vested interest in being able to give the false appearance of doing a good job, to the taxpayer who must pay all the bills. I hold the position that such actions as this cannot help but eventually have a delierious (sic) effect on the students and should be stopped.

* * *

. . . . . it is my contention that it is because I have refused to go along with the administration in its efforts to turn a course into a dumping ground, where students could expect to pick up an "easy credit", just for coming to class; a class where I would be expected to cover up the poor performance of students and the administration and make them "look good on paper"; this, I contend, is the real motivation behind the critical evaluation I have received and its recommendation that I be subject to punative (sic) financial action.

* * *

It is incredible; it is strange; and, it is amazingly amusing; the similarity in the situation of public education today, and the theme that runs through that old, old, children's fairy tale called, "The Emperor's New Clothes".

Today, "The Emperor" translates into "The Taxpayer"; I'll let you struggle with the problem of figuring out who shold be cast in the role of the two "tailors".

The public has paid out billions in an ever increasing educational effort that, in theory, has brought us, "the finest set of threads in the land". Educators scurry across The Empire assuring us that if students fail test it's only because they have been given the wrong test! They heap effusive praise upon His Royal Majesty, "The Taxpayer", for his past wisdom of spending more and more funds upon the Public School System That Adorn The Land.

Despite the contents of these earlier memos, the former principal, Carl Weimer, did not regard them very seriously and declined even to characterize them as sarcastic. (T.488)

B. FOR SEVERAL YEARS PRIOR TO 1983-84 HESSE'S EVALUATIONS WERE EXCELLENT

The evaluations of Hesse's teaching for the school years 1979-80, 1980-81, 1981-82, and 1982-83 were all marked in the highest category with no indications of needing improvement. (Pl. ex. 4, 5, 6, 7) The same was true of the January and February 1977 evaluations (Pl. ex. 2) and the November 1978 evaluation (Pl. ex. 3). In his December 1978 and May 1979 evaluations he was criticized on issues of grading and discipline. (Pl. ex. 3)

Thus the implication that Hesse began the 1983-84 school year on a wave of "protest" and "disruption" is completely inaccurate.

C. THE 1983-84 SCHOOL YEAR: SPEECH AND CONSEQUENCES

Jack Gaza became the principal at Schaumburg in 1983. His first real encounter with Hesse came in September after Hesse's "anger display" to his class which had come to school entirely unprepared. Hesse explained to Gaza that he was concerned about the safety of the students and that he would explain his actions to any parents and apologize if they believed he was being unreasonable. Apparently Hesse also took the opportunity to further express his educational opinions to Gaza who concluded that Hesse saw himself as a crusader.

Even from the defendants' version of the events transpiring at the teacher's institute, it is evident that Hesse spoke about matters of public concern in his questions of the speaker. However, the defendants' attempt to portray Hesse as a teacher who "staged a demonstration" is contrary to the evidence. Hesse, as well as several other teachers sat in an area taped off by masking tape which he described as looking like "the web of a spider on LSD. . . ." (Pl. ex 39) He held up a ball of tape to illustrate his question of the speaker about treatment of teachers.

That Gaza was upset by Hesse's questions at the intitute cannot be doubted because he immediately undertook a concerted effort to get rid of him. He engineered a list of "goals and objectives" which were presented to the Board as shortcomings in Hesse's teaching but which were shown by the testimony of the Art Department Chair (Wheat) to be false. This list was appended to a resolution of the Board preparatory to dismissing Hesse. The Board also directed him to undergo a psychiatric examination without ever asking the administrators for the reason. (T. 454) Gaza threatened Hesse with distribution of the psychiatric report and with dismissal if Hesse refused the examination. (T.78, Pl. ex 26)

The next fall Gaza presided over a meeting designed to harass Hesse and to fill his personnel file with negative material in a transparent attempt to get rid of him. The meeting was so blatant that Wheat threatened to resign his chairmanship. (T.255) This pattern of behavior continued with unusually large assignments of study halls and the transfer to a travelling teacher position.

When the level of harassment continued unabated, Hesse filed suit. By that time, Hesse's personnel file was full of negative evaluations which, according to the testimony of Dr. Donald Johnson, an educational expert, would essentially keep him from obtaining work in any other district. (T. 187-198.)

D. APPLYING AN OBJECTIVE STANDARD

The defendants urge that Hesse's speech is not protected because his statements on grade fraud, student discipline and the use of evaluations to intimidate teachers were made in reaction to criticisms by the administration. In other words, if the speech is in any way personal to the application of disputed rules to the employee, defendants contend that First Amendment protection is automatically foreclosed. The Seventh Circuit appears to have agreed

in this instant cause although it ruled to the contrary in *Knapp v. Whitaker*, 757 F2d 827 (7th Cir., 1985).

Such an analysis is a subjective one, requiring a court to delve into all of the facts and eliminate from protection those criticisms of public agency policies which are being applied to the speaker's duties. That interpretation is undesirable for two reasons. First, it denies protection to those persons who are in the best position to criticize how public agencies fulfill their functions. Secondly, by its very subjective nature, the test is a potent means of second guessing a jury. If a court concludes that the *motive* of the speaker was merely retaliation for, or protection from, legitimate criticism and direction, First Amendment protection can be denied under this test. The proper approach, however, is to allow the jury to determine, under *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977) whether the *protected* speech (i.e. that speech which dealt with issues of public concern) was a substantial or motivating factor in the personnel action or whether the same action would have been taken irrespective of the speech.

Subjective issues such as motive have generally been considered more appropriate for determination by the fact finder. In this case, however, the Appellate Court overrode the jury's determination of motivation with its own interpretation.

Because *Connick v. Myers*, 461 U.S. 138 (1983) dealt with a single questionnaire it lent itself more to a clear delineation of what speech is protected. In most instances, however, the communications to be analyzed are numerous and frequently combine speech which is public in nature with that which is private. A subjective analysis of such communications complicates an already difficult task. A more objective, content-based analysis should be employed at the first level, since it is better to err in granting more constitutional protection to speech than less. Hesse's state-

ments, therefore, on the issues of grading, discipline and teacher evaluation procedures should be granted protection irrespective of the fact that they were subjects in dispute between Hesse and the administration.

II. DISRUPTION ATTRIBUTED TO EXERCISE OF FIRST AMENDMENT RIGHTS SHOULD NOT BE INFERRED FROM SARCASM OR FROM THE MERE FACT OF STRONGLY EXPRESSED IDEAS

The defendants, and indeed the Seventh Circuit, infer disruption from the following sources: Sarcasm in 1977-79 memos differing with district policies and defending Hesse's teaching methods; 2) the "personal tone" of Hesse's memoranda; 3) the testimony of the school nurse, the principal (a defendant) and a teacher charged with the auditorium management that Hesse's questions at the institute embarrassed them; and 4) testimony that members of the audience told Hesse to sit down and stop talking at the institute. This appears to comprise the "massive documentary and testimonial evidence" referred to by the defendants. This evidence must be analyzed in its proper perspective

First, as shown above, the 1977-79 memos preceded 4 years of excellent evaluations of Hesse. Thus it could hardly be said that the events occurring in the 1983-84 school year were set against a background of havoc or disturbance nor was a shred of evidence adduced to that effect.

Secondly, there was no evidence that Hesse worked closely with any of his superiors. Gaza and he rarely had contact and Gaza did not even do evaluations based upon classroom observations. (T. 287) Maddox, the assistant principal, was assigned to do annual evaluations of Hesse and had only evaluated him twice before the goals and objectives were written. (T. 293) In this organizational framework, without greater evidence in the record, it is difficult to see how the statements made by Hese "un-

dermined vital working relationships and obstructed the functioning of important school district procedures." (Resp. brief p. 27) Further, it should be noted that in 1984 and 1985 Hesse had a statutory right to respond to written memos in his personnel file. Ch. 48, Sec. 2002, *Ill. Rev. Stat.* (The statute was declared unconstitutionally vague in its definition of records in 1986.)

The balance of the basis for the defendants' claim of disruption is the testimony referred to above. Cumulatively it could hardly amount to "numerous witnesses." The upshot of defendants' assertion that such testimony should defeat Hesse's right to speak is that the question of First Amendment protection is subject to a popularity vote.

The evidence presented at trial clearly demonstrated that any disruption which was caused by Hesse's statements was really caused by Gaza's actions to get rid of Hesse. Significant in this regard is that the claimed basis for Gaza's actions was Hesse's teaching. Hesse was never accused *at the time* of being disruptive. The record further demonstrated that Hesse complied with direction.

The trial court observed the witnesses and heard the evidence. Had it been convinced under the test of *Pickering v. Board of Education*, 391 U.S. 563 (1968) that Hesse's interests in speaking were outweighed by the supposed disruption he caused, the court would have entered judgement notwithstanding the verdict. It did not.

The jury heard the testimony including two former students of Hesse's and saw the evidence including slides of Hesse's students' work. (Pl ex. 8) The jury was properly instructed, pursuant to *Mt. Health City School District v. Doyle*, 429 U.S. 274 (1977), that if the defendants would have taken the same action irrespective of the protected speech, they must find in favor of the defendants. They did not.

There is no doubt that Hesse's speech was occasionally

sarcastic, but sarcasm is not the same as disruption or even insubordination as defendants seem to contend. An objective test analyzing the actual disruption or the genuine threat of disruption is more appropriate than the subjective test applied here which has overinterpreted that threat arising from sarcasm.

CONCLUSION

For the reasons set forth above, Petitioner respectfully urges this Honorable Court to issue a Writ of Certiorari to review the judgement and opinion of the Seventh Circuit.

Respectfully submitted,

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